NO. 85131-0

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE PERSONAL RESTRAINT PETITION OF
HOYT WILLIAM CRACE,

RESPONDENT

Court of Appeals Cause No. 37806-0
Superior Court of Pierce County No. 03-1-03797-6

SUPPLEMENTAL BRIEF OF PETITIONER

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2. When the proper standard of assessing ineffective assistance of counsel is applied to this case, has petitioner failed to meet his burden of showing the existence of constitutional error much less that any constitutional error caused him actual prejudice so as to entitle him to collateral relief?

B. STATEMENT OF THE CASE.

Procedural History of Personal Restraint Petition

Over three years ago, on May 27, 2008, Hoyt Crace filed a timely, first-time collateral attack with the Court of Appeals, Division II, challenging his judgment and sentence entered in Pierce County Superior Court Cause No. 03-1-03797-6, on several grounds. A jury had convicted Crace of attempted assault in the second degree with a deadly weapon enhancement, malicious mischief in the second degree and criminal trespass. The Court of Appeals initially dismissed the petition in an unpublished opinion issued on January 20, 2010. Crace filed a motion for reconsideration arguing that "[t]here is now a solid and robust line of

authority holding that a defense attorney is per se ineffective when he fails to request an available lesser included instruction and instead unreasonably exposes a defendant to an 'all or nothing' outcome." In support of this claim, Crace listed several decisions from different divisions of the Court of Appeals. Upon reconsideration, the Court of Appeals withdrew its earlier opinion and issued a published opinion of a divided court; the majority granted Crace collateral relief by finding that his trial counsel was ineffective for failing to propose a lesser included instruction on unlawful display of a weapon. ***In re Crace***, 157 Wn. App. 81, 109, 236 P.3d 914 (2010). The majority opinion relied upon the decisions in ***State v. Ward***, 125 Wn. App. 243, 104 P.2d 670 (2004), ***State v. Smith***, 154 Wn. App. 272, 223 P.3d 1262 (2009), ***State v. Pittman***, 134 Wn. App. 376, 166 P.3d 720 (2006) and its earlier decision in ***State v. Grier***, 150 Wn. App. 619, 208 P.3d 1221 (2009) *review granted*, 167 Wn.2d 1017, 224 P.3d 773 (2010). *See* ***In re Crace***, 157 Wn. App. 81, 109, 236 P.3d 914 (2010).

The State filed a timely motion for reconsideration challenging the court's reliance on these cases, and the three prong test they advocated for assessing a claim of ineffective assistance of counsel for a failure to seek instruction on a lesser included offense. The State further argued that the majority decision was incorrect on another legal basis: the decision held

that a petitioner attacking his conviction on collateral review for ineffective assistance of counsel need only make the same showing of prejudice that a defendant on direct review had to make to succeed on this claim. The State argued that numerous decisions of this Court have held that only a petitioner who can establish "actual and substantial prejudice" is entitled to collateral relief. To establish "actual and substantial prejudice," a petitioner must show that the outcome of the trial *more likely than not* would have been different had the deficient performance not occurred and that this is a higher standard than a *reasonable probability* of a different outcome- the standard used by the Court of Appeals. *See* ***In re Hagler***, 97 Wn.2d 818, 826, 650 P.2d 1103 (1982). The Court of Appeals denied the State's motion for reconsideration[1] and the State sought discretionary review in this Court.

This Court stayed consideration of the State's motion for discretionary review until it issued the decision in ***State v. Grier***, 171 Wn.2d 17, 246 P.3d 1260 (2011). In ***Grier***, this Court unanimously reversed the Court of Appeals decision finding Grier's attorney was ineffective for failing to request lesser included instructions, and in finding

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[1] In a subsequently published opinion, Division II has reiterated that it believes the "reasonable probability" standard to be the correct standard to assess a claim of prejudice when ineffective assistance of counsel is raised on collateral review. ***In re Personal Restraint of Monschke***, 160 Wn. App. 479, 491-92, 251 P.3d 884 (2010)(citing the decision in ***In re Crace*** as authority).

that an "all or nothing" approach was not a reasonable trial tactic. In doing so, the Supreme Court criticized the lower court's use of a three pronged test to assess Grier's claim and reaffirmed the standard set forth in ***Strickland*** as the proper analysis for ineffective assistance of counsel claims. The line of cases cited as using this erroneous three pronged test started with ***State v. Ward***, 125 Wn. App. 243, 104 P.3d 670 (2005), and went on to include the decision now on review. ***Grier***, 171 Wn.2d at 37.

After receiving supplemental briefing on the impact of ***Grier*** on the decision below, this Court granted the State's motion for discretionary review.

Facts pertaining to petitioner's trial and direct appeal.

A jury convicted petitioner of attempted assault in the second degree (as a lesser included offense of the charged assault in the second degree), criminal trespass in the first degree, and malicious mischief in the second degree; the jury found a deadly weapon enhancement on the assault. *See* State's initial response, Appendices A & B. The opinion on direct review summarized the evidence regarding the assault as follows:

> On August 17, 2003, at 2:25 a.m., Pierce County Sheriff's Deputy Hardesty received a call from dispatch directing him to a possible burglary in progress at a residence in a mobile home park. As Hardesty got out of his car, a man approached him and stated that an unknown male burst into his neighbor's home and then fled. The man said that the subject ran about two blocks away to the north and that he was armed with a sword. At that moment, Hardesty, who

> had a flashlight in his hand, saw a male approximately two blocks away jumping up and down in the middle of the street, yelling and screaming at the top of his lungs. The suspect was later identified as Crace. Hardesty could see a long, chrome-like object in Crace's hand. When Crace made eye contact with Hardesty, he began running at full speed toward the officer. As Crace ran, he yelled, 'They are after me, someone help me.' As Crace drew closer, Hardesty saw a sword in his hand. Hardesty drew his weapon and directed Crace to drop the sword. Crace kept running at Hardesty, and Hardesty kept repeating his command to drop the sword. Finally, Crace dropped the sword when he was approximately 50 feet away from the officer but continued running at Hardesty. The officer repeatedly commanded him to get on the ground, and Crace complied when he was approximately five to seven feet from the officer.

See, Appendix C to the Petition, Opinion from Direct Appeal.

After assessing petitioner's criminal history, which consisted of nine prior felonies, including two prior convictions for robbery in the first degree and one prior conviction for robbery in the second degree, the sentencing court found petitioner to be a persistent offender and sentenced him to life without the possibility of parole on the attempted assault. State's initial response, Appendix A. The court imposed a high end concurrent standard range sentence on the malicious mischief and a suspended sentence on the trespass. State's initial response, Appendices A & B. Petitioner appealed his convictions, challenging the court's instructions and the sufficiency of the evidence. In an unpublished opinion, the Court of Appeals, Division II, affirmed the judgment entered

in the trial court. *See* Appendix D to the Petition. The court issued the mandate on June 19, 2007. *See* Appendix E to the Petition.

C. ARGUMENT.

1. THIS COURT SHOULD MAINTAIN THE DISTINCTIONS BETWEEN COLLATERAL AND DIRECT REVIEW AND CONTINUE TO REQUIRE A PETITIONER TO SHOW, BY A PREPONDERANCE OF THE EVIDENCE, THAT HE WAS ACTUALLY AND SUBSTANTIALLY PREJUDICED BY A CONSTITUTIONAL ERROR BEFORE OBTAINING COLLATERAL RELIEF.

It is a long standing principle in Washington law that a "personal restraint petition is not to operate as a substitute for a direct appeal." ***In re Hagler***, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). This Court expressly rejected the idea that constitutional errors that can never be harmless on direct appeal will also be presumed prejudicial in a personal restraint petitions. ***In re Personal Restraint of St. Pierre***, 118 Wn.2d 321, 823 P.2d 492 (1992), citing ***In re Boone***, 103 Wn.2d 224, 233, 691 P.2d 964 (1984).

> We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders. Therefore, we decline to adopt any rule which would categorically equate per se prejudice on collateral review with per se prejudice on direct review. Although some errors which result in per se prejudice on direct review will also be per

> se prejudicial[2] on collateral attack, *the interests of finality of litigation demand that a higher standard be satisfied in a collateral proceeding.*

St. Pierre, 118 Wn.2d at 329 (internal citation omitted)(emphasis added).

It was in ***Hagler***, that this Court discussed the federal standard applicable to collateral attacks and how the federal petitioner had "'the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" ***Hagler***, 97 Wn.2d at 825, quoting ***United States v. Frady***, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L.Ed.2d 816 (1982). This Court then adopted the standard for state collateral attacks. ***Hagler***, at 825. It also articulated how this standard shifted an additional burden onto the petitioner. Once a criminal defendant shows a constitutional error in a direct appeal, the burden is on the State to show the error is harmless beyond a reasonable doubt, but in a collateral attack the burden is on the petitioner to show that the error was not harmless – or, said conversely – that it was prejudicial. This Court held that this additional burden had to be proved by a preponderance of the evidence:

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[2] This Court has found that proof of a constitutionally invalid plea constitutes proof of actual prejudice on collateral review. ***In re Hews***, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

> Thus, in order to prevail in a collateral attack, a petitioner must show that *more likely than not* he was prejudiced by the error.

Hagler, 97 Wn.2d at 826 (emphasis added). A petitioner who cannot establish actual and substantial prejudice is not entitled to collateral relief. ***St. Pierre***, 118 Wn.2d at 330-331. This principle has been reiterated by this Court repeatedly. ***In re Davis***, 142 Wn.2d 165, 170-171, 12 P.3d 603 (2000), citing ***In re Personal Restraint of Benn***, 134 Wn.2d 868, 884-85, 952 P.2d 116 (1998) (citing ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 303, 868 P.2d 835 (1994); ***Matter of Pirtle***, 136 Wn.2d 467, 490-93, 965 P.2d 593 (1998); ***In re Personal Restraint of Hews***, 99 Wn.2d 80, 87, 660 P.2d 263 (1983); ***In re Personal Restraint of Cook***, 114 Wn.2d 802, 810, 792 P.2d 506 (1990)).

This line of authority reflects that a petitioner in a collateral attack is not entitled to the benefit of many legal standards that are available to a defendant on direct review. For example, the rule that constitutional errors must be shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. ***In re Mercer***, 108 Wn.2d 714, 718 21, 741 P.2d 559 (1987); ***Hagler***, 97 Wn.2d at 825. Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and not against it. ***Hagler***, 97 Wn.2d at 825 26.

The decision of the majority below ignores this long-standing principle and holds that when a petitioner presents a claim of ineffective assistance of counsel on collateral attack he must make no greater showing of prejudice than an appellant would on direct appeal. *See* ***In re PRP of Crace,*** 157 Wn. App. at 110 ("But we disagree [with the State] that a petitioner must undermine our confidence in the trial more than an appellant must."). As the majority decision below relieved Crace of the increased burden imposed on a petitioner in a collateral attack, it is in direct conflict with ***Hagler*** and the above cited line of authority.

The majority opinion views the State's argument as advocating that the standard set forth in ***Strickland***[3] be either altered or ignored when a claim of ineffective assistance of counsel is raised in a personal restraint petition. That is not the State's argument. The ***Strickland*** standard is the correct standard to assess whether there has been a constitutional violation of the Sixth Amendment right to counsel. ***State v. Grier***, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). When the ***Strickland*** standard is met in a direct appeal, then the appellant has demonstrated a constitutional violation and will be entitled to a new trial unless the State can show that the ineffective representation was harmless beyond a reasonable doubt.

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[3] ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). The standard is set forth later in this brief at p. 13.

Hagler, at 825-26. In a collateral attack, a petitioner who establishes ineffective assistance of counsel under the ***Strickland*** standard has established the existence of constitutional error, but under ***Hagler***, will not be entitled to relief until he shows, by a preponderance of the evidence, that he was more likely than not prejudiced by the error. *Id.*

Thus, a petition seeking collateral relief on a claim of ineffective assistance of counsel must meet two different burdens of showing prejudice. To establish a constitutional error under ***Strickland***, he must show there is a *reasonable probability* that the result would have been different but for the defense attorney's errors. But to obtain collateral relief, he must make a higher showing that the outcome of the trial *more likely than not* would have been different had the constitutional error not occurred. *See*, ***Hagler***, at 826.

The different functions of these two standards is demonstrated in the decision of this Court in ***In re Personal restraint of Rice***, 118 Wn.2d 876, 828 P.2d 1086 (1992). Rice raised a claim of ineffective assistance of counsel in his personal restraint petition. The court noted that no evidentiary hearing would be required on this issue if "in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the *Strickland* test." ***Rice***, 118 Wn.2d at 889, citing ***Hill v. Lockhart***, 474 U.S. 52, 60, 106 S. Ct. 366, 371, 88 L.Ed.2d 203 (1985). Ultimately, this Court dismissed Rice's ineffective assistance of counsel claim because he had "not presented sufficient facts or

evidence to establish *a prima facie* case of ineffective assistance under the *Strickland* test." ***Rice***, at 889 (emphasis added). This language makes it clear that a petitioner cannot obtain collateral relief simply by establishing the existence of error under the ***Strickland*** standard, as this represents only one of the hurdles that must be overcome before he is entitled to collateral relief. *See also*, ***In re Hews***, 99 Wn.2d at 88 (After making a prima facie showing that his plea was constitutionally invalid, Hews was entitled to a hearing where he had "the burden of establishing that, more likely than not, he was actually prejudiced by the claimed error.").

The cases cited above establish that collateral relief is a distinct process from a direct appeal, and that a court applying legal principles applicable to a direct review cannot be assured that it has addressed all of the legal standards applicable to a collateral attack. The burden on a petitioner seeking collateral relief is intentionally more onerous in order to protect the finality of judgment and the prominence of the trial court –two very important concepts that strengthen the public's confidence in the justice system as a whole.

> One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.'

McCleskey v. Zant, 499 U.S. 467, 491, 111 S. Ct. 1454 (1991), citing *Teague v. Lane*, 489 U.S. 288, 309, 109 S. Ct. 1060, 1074, 103 L.Ed.2d 334 (1989). Any decision that grants collateral relief when the petitioner has done nothing more than make the same showing required of a defendant on direct review flies in the face of the long standing principles cited above. Decisions, such as the majority opinion below, that fail to maintain the distinctions between collateral attacks and direct appeals are harmful in that they undercut the finality of judgments and lead to collateral attacks becoming an endless string of appeals. This Court should overrule the decision below to the extent that it holds that a petitioner in a collateral attack raising a claim of ineffective assistance of counsel bears no higher burden that an appellant raising a similar claim on direct review.

As will be argued below, petitioner in this case failed to meet his burden of showing either constitutional error or that such error actually prejudiced his case.

2. PETITONER HAS FAILED TO MEET HIS BURDEN OF SHOWING THE EXISTANCE OF CONSTITTUIONAL ERROR UNDER ***STRICKLAND*** OR THAT HE IS ENTITLED TO COLLATERAL RELIEF.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80

L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. Recently, the United States Supreme Court reiterated just how strong a presumption of competence exists under ***Strickland***: "The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom." ***Harrington v. Richter***, ___U.S. ___, 131 S. Ct. 770, 778, 178 L.Ed.2d 624 (2011) (citing ***Strickland***, 466 U.S. at 690). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time

of counsel's conduct." *Id.* at 690; ***State v. Grier***, 171 Wn.2d 17, 40, 246 P.3d 1260 (2011); ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). The Court recognized that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." ***Strickland***, at 689. Only in rare situations would the "wide latitude counsel must have in making tactical decisions" limit an attorney to a single technique or approach. *Id.*

> [T]he standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.

Harrington, 131 S. Ct. at 788. As the Supreme Court has stated "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); ***Campbell v. Knicheloe***, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988);

Grier, 171 Wn.2d at 42-43. A court will not find deficient performance if the challenged actions of counsel go to the theory of the case or to trial tactic. ***Grier***, 171 Wn.2d at 33, citing ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). "[T]he defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" ***Grier***, 171 Wn.2d at 42, citing ***State v. Reichenbach***, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)(emphasis added in ***Grier***).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." ***Harris v. Dugger***, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

> After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

Harrington, 131 S. Ct. at 790.

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice. ***Strickland***, 466 U.S. at 694. "In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the

outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently...[but] whether it is "reasonably likely" the result would have been different." ***Harrington***, 131 S. Ct. at 792. "The likelihood of a different result must be substantial, not just conceivable." *Id.* Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002). In ***Strickland***, the Court indicated that, "[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." 466 U.S. at 694; ***Grier*** 171 Wn.2d at 34.

In sum, ***Strickland*** requires a showing of more than an attorney making a few mistakes at trial; it requires a lapse of constitutional magnitude where it is as if the defendant did not have an attorney at all. Proper examination of such claims requires deference to counsel, avoiding hindsight, recognizing there is an art to lawyering with different stylistic approaches, and accepting that mere error by counsel is not enough to prove prejudice.

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, petitioner seeks to show ineffective assistance of counsel based on a single allegation of deficient performance: that counsel failed to request lesser included instruction on unlawful display of a weapon on the assault in the second degree charge. The majority of the court below found deficient performance using the three pronged test that was rejected by this Court as skewing the ***Strickland*** standard. ***State v. Grier***, 171 Wn.2d at 38-42. When the correct standard is applied, it is clear that petitioner has failed to show the existence of constitutional error, much less that he was actually prejudiced by it so as to be eligible for collateral relief.

Here the record shows that defense counsel was prepared for trial, had used an investigator[4] to help with his preparations and developed a cogent defense theory based upon expert testimony that the defendant was incapable of formulating any intent to commit a crime on the relevant night. During voir dire he asked questions of potential jurors and focused on those who had connections with or experience in a law enforcement/security or medical fields. *See* Appendix H to the petition, Vol.1 RP 28-45. This shows that he was looking to see whether any jurors might give special credence to the State's primary witness and victim, Officer Hardesty, and discern whether any potential jurors might have some exposure to concepts to which the defense mental health expert

[4] Appendix H to the petition, Vol.2 RP 46.

would be testifying. At the CrR 3.5 hearing, defense counsel cross examined the officer as to the sequence of events. Appendix H to the petition, Vol.2 RP 19-25. While defense counsel stipulated that the petitioner's statements were admissible, the court recognized that the statements were helpful to the defense case. *Id.* at RP 28-29. Counsel successfully defeated a prosecution motion to exclude the testimony of his expert witness. *Id.* at RP 30-41. Counsel sought to exclude petitioner's criminal history, should he testify at trial, and was successful at excluding everything but the crimes of dishonesty. *Id.* at RP 49-54. He cross-examined the State's witnesses, focusing on facts that were helpful to the defense theory. *Id.* at RP 82- 100, 106-107; Vol 3 RP 217-231. He presented the petitioner's testimony and the testimony of an expert witness to support a diminished capacity defense in an effort to show that petitioner was in a cocaine induced psychotic break that rendered him incapable of formulating any intent. *Id.* at RP 108-136, 167- 79. Counsel proposed a jury instruction, which the court gave over the State's objection. *Id.* at RP 195-199. Counsel gave a cogent closing argument asking the jury to find the defendant not guilty of any of the crimes because he was incapable of formulating the required intent to commit any of the crimes. *Id.* at Vol. 3 RP 260-280. Counsel reminded the jury to hold the State to its burden of proof and argued that even if it rejected the petitioner's testimony, that the State's evidence did not support a finding of guilt. *Id.*

This record shows that counsel developed a cogent defense theory and also challenged the State's evidence. Defense counsel did not propose any lesser included instructions showing that, tactically, he was pursuing an "all or nothing" approach to the case. As this Court recently noted "[a]lthough risky, an all or nothing approach [is] at least conceivably a legitimate strategy to secure an acquittal." ***Grier***, 171 Wn.2d at 42. That this tactical approach was unsuccessful does not make counsel's performance deficient. Petitioner has failed to meet his burden of establishing the lack of any conceivable legitimate tactic for this decision. Moreover, he fails to show that, looking at the entirety of the record, that his counsel's performance essentially left him without representation. The record in this case shows that counsel was unsuccessful, not that he was incompetent. Petitioner has not met his burden in showing deficient performance.

Petitioner also fails to show that there is a reasonable probability that the jury would have convicted him only of unlawful display of a weapon had it been given that option. The record shows that Deputy Hardesty responded to a burglary-in-process call, and saw the petitioner a couple of blocks away with a long object in his hands. Appendix H to the petition, Vol 2 RP 65. The deputy testified that petitioner made eye contact with him and began running at full speed right toward him; as petitioner approached, Deputy Hardesty could see that he was carrying a sword. *Id.* at Vol 2 RP 65. Deputy Hardesty drew his weapon and

directed petitioner to drop the sword. *Id.* at Vol 2 RP 66. Petitioner kept running at Deputy Hardesty, while Deputy Hardesty kept repeating his command to drop the sword; petitioner finally complied when he was about 50 feet from the deputy. *Id.* at Vol 2 RP 67. After petitioner dropped the sword, he continued to run at Deputy Hardesty. *Id.* at Vol 2 RP 68. Deputy Hardesty repeatedly commanded him to get on the ground. *Id.* at Vol 2 RP 68. Petitioner finally complied when he was 5-7 feet from the deputy. *Id.* at Vol 2 RP 68. Deputy Hardesty testified that officers are trained regarding the "21 foot rule" which is the distance at which someone armed with a knife can reach an officer to inflict injury before an officer has time to draw his gun. *Id.* at Vol 2 RP 77. Officer Hardesty testified that he was very frightened for his safety as petitioner ran toward him and was prepared to shoot him even after his discarded the sword. *Id.* at Vol 2 RP 78. The deputy indicated that he would have shot him if petitioner had come a couple of steps closer. *Id.* at Vol 2 RP 91. The deputy demonstrated for the jury how petitioner was holding the sword and how petitioner ran toward him. *Id.* at Vol 2 RP 80-81. The jury also saw a physical demonstration of the distance at which petitioner dropped the sword and the distance at which petitioner got on the ground. *Id.* at Vol 2RP 87-88. For a jury to find petitioner guilty of unlawful display of a weapon, it would have to find that there was nothing assaultive about petitioner's conduct. Considering the deputy's testimony that he was on the verge of shooting petitioner because he felt that his life was in danger,

the great weight of the evidence supported the conclusion that defendant's charge directly at the deputy was assaultive. Given the evidence it is unlikely that the jury would have convicted petitioner only of unlawful display of a weapon.

The results of the trial show that the jury rejected the petitioner's diminished capacity defense for all the crimes with which he was charged and convicted him of criminal trespass in the first degree, malicious mischief in the second degree and the lesser included offense of attempted assault in the second degree after being unable to unanimously agree on the charged offense of assault in the second degree. To convict petitioner of the attempted assault, the jury had to find beyond a reasonable doubt that he "did an act which was a substantial step toward commission of an Assault in Second Degree" and that this act was "done with the intent to commit Assault in the Second Degree." *See* Appendix F to the petition, Instruction No. 17. Thus, the jury clearly found that petitioner was capable of a spectrum of mens rea - of acting intentionally, knowingly and maliciously. This Court must assume that the jury would not have convicted Crace of attempted assault in the second degree unless the prosecution had met its burden of proof. *See*, ***Grier***, 171 Wn.2d at 43-33. Therefore, the mere availability of the option to convict on unlawful display of a weapon, does not provide evidence that the jury would have returned such a verdict. Here the jury was unable to reach agreement on the charge of assault in the second degree; it did not acquit the petitioner

of this offense. Appendix H to the petition, Vol. 3 RP 292-93. Thus, it would appear that the difficulty that the jury had was agreeing on whether petitioner got close enough to Deputy Hardesty while armed with the sword for it to be a completed assault, or whether he started toward the deputy intending to assault him with the weapon, but abandoned the sword before the assault was complete. Considering the verdicts the jury did return, petitioner has not shown a reasonable probability that the availability of convicting on unlawful display of a weapon would have affected the outcome of his trial. Petitioner has failed to show the level of prejudice necessary to show that there was an error of constitutional magnitude under ***Strickland.*** For this reason, his claim of ineffective assistance of counsel must fail. This Court should reverse the decision of the Court of Appeals finding that petitioner had met his burden under ***Strickland.***

Additionally, petitioner has failed to show that it is more likely than not that the jury would have returned a verdict for unlawful display of a weapon rather than for attempted assault in the second degree had that instruction been requested. For this reason, he has failed to show that he is entitled to any collateral relief.

D. CONCLUSION.

This Court should reverse the decision of the Court of Appeals granting collateral relief and dismiss the petition.

DATED: August 12, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.12.11
Date Signature

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From: Therese Nicholson-Kahn [mailto:tnichol@co.pierce.wa.us]
Sent: Friday, August 12, 2011 3:41 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: In Re: The PRP of Hoyt Crace, No. 85131-0, Supplemental Brief of Petitioner

Attached please find the Supplemental Brief of Petitioner for the below referenced matter:

In Re: The PRP of Crace
No. 85131-0
Submitted by: K. Proctor
WSB #14811

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to K. Proctor